

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES,

Plaintiff,

ORDER

-against-

97 CR 1177 (DRH)

KEITH RICHTER,
Defendant.

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APPEARANCES:

Keith Richter, Pro Se
P.O. Box 1000
Lewisburg, Pennsylvania 17837

HURLEY, District Judge:

The Court is in receipt of Defendant's "Memorandum of Law in Support of Motion Under Rule 60(b) (1 thru [sic] 6)" filed on December 9, 2005. The motion is predicated on Federal Rule of Civil Procedure 60(b), which is inapplicable to criminal proceedings. In reviewing the motion, however, it appears that what Defendant actually seeks is relief pursuant to 28 U.S.C. § 2255.

In *Adams v. United States*, 155 F.3d 582 (2d Cir. 1998), the Second Circuit held that district courts may not sua sponte convert post-conviction motions, putatively brought under some other provision, into motions pursuant to 28 U.S.C. § 2255 without first giving the defendant notice and an opportunity to decline the conversion or withdraw the motion. *Id.* at 584. This is because if the Court elects to treat the motion under § 2255, and then denies it, any subsequent motion brought by Defendant under § 2255 will be subject to the restrictions on second or successive motions set forth in 28 U.S.C. § 2255. That section provides that second or successive petitions may only be heard if they involve newly discovered evidence of a

potentially dispositive nature or a new and retroactive rule of constitutional law.

Accordingly, Defendant's motion for relief under Rule 60(b) is denied but without prejudice to convert his motion to a habeas corpus petition under 28 U.S.C. § 2255.

Defendant is hereby put on notice, however, that any such conversion may cause the Defendant's subsequent filing of a motion under § 2255 to be barred as a second petition. Defendant shall advise the Court within 60 days of the date of this Order if he wishes to so convert his motion.

SO ORDERED

Dated: Central Islip, New York
December 30, 2005

/s_____
Denis R. Hurley
United States District Judge